

APR 1 - 1996

FEDERAL COMMUNICATIONS COMMISSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Amendment of Part 20 and 24 of the |) | WT Docket No. 96-59 |
| Commission's Rules — Broadband PCS |) | |
| Competitive Bidding and the Commercial |) | |
| Mobile Radio Service Spectrum Cap |) | |
| |) | |
| Amendment of the Commission's |) | GN Docket No. 90-314 |
| Cellular/PCS Cross-Ownership Rule |) | |

**COMMENTS OF NATIONAL TELECOM
ON NOTICE OF PROPOSED RULE MAKING**

National Telecom PCS, Inc. ("NatTel"), a minority-controlled business, hereby submits its comments on the above-referenced Notice of Proposed Rule Making ("NPRM") with respect to the D, E and F block PCS auctions.

INTRODUCTION

Unfortunately, by its own doing, the Commission has placed both itself and DEs between a rock and a hard place. After almost one year since Adarand, the Commission still has not undertaken to create the factual record required by Adarand to support race-based preferences. See, NPRM (Separate Statement of Commissioner Barrett).

Thus, we are all once again forced to sacrifice the Commission's statutory imperative to promote economic opportunity for minorities in wireless telecommunications at the altar of expediting the roll-out of PCS to

the public by holding the D, E and F block PCS auctions expeditiously (which requires, by definition, the avoidance of TEC-type litigation, spawned by race-based preferences adopted without a sufficient factual predicate).

In other words, regardless of the action taken by the Commission on this issue, we are left with a “no-win” situation. If the Commission scraps the race-based preferences, as it proposes to do in the NPRM, then not only will the Commission fail to uphold its statutory mandate, but such an action will likely result in few, if any, minorities acquiring D, E or F block PCS licenses.¹ On the other hand, if the Commission maintains the race-based preferences in the F block auction, it is a virtual certainty that TEC-type litigation will occur, resulting in lengthy and, perhaps, fatal delays in the F block auction.²

Notwithstanding this unfortunate and difficult situation, NatTel seeks not to cast blame but rather to assist in developing a solution. As such, NatTel suggests the following with respect to the D, E and F block PCS auctions.

¹ Although, as the Commission noted in the NPRM, 46 minority applicants qualified to bid in the C block auction, few remain today and perhaps only a handful will actually end up with C block licenses when all is said and done. Surely such a result was not what Congress intended when it enacted Section 309(j)(2)(B) of the Communications Act.

² The Commission has no one to blame but itself for this policy quandary which it now faces. NatTel has commented on and participated in the DE rulemakings since their inception in the summer of 1994. NatTel was virtually alone in warning the Commission in January 1995 not to voluntarily delay the C block short form application deadline, warning that a voluntary delay would result in a Pandora’s box of additional, uncontrollable and interminable involuntary delays. See, *General Comment on the Timing of the C Block Short-Form Application Deadline*, (Jan. 24, 1995) (“NatTel is of the firm belief that the deadline for filing Short Form Applications for the C block auction should remain February 28, 1995; regardless of when the auction for the A and B blocks is completed) (emphasis in original). Unfortunately, NatTel’s warnings, like a voice in the wilderness, went unheeded. And when NatTel’s prophesy came to pass in the form of TEC, Adarand, Omnipoint, and Radiofone, the rationale used by the Commission at the time to delay the C block short form application deadline (that MTA bidders needed to finish their auction in order to have time to partner with C block bidders) was proven to be wholly illusory.

I. RACE/GENDER PROVISIONS

Scrap them, and make the control group requirements the same as in the C block. As argued below, by extending small business provisions to the D and E blocks, the Commission will maximize the chances that minorities and women will actually end up with some PCS licenses at the end of this process.

II. AFFILIATION RULES

First of all, NatTel believes that any a priori assumption that F block values will be lower than those in the C block is unwise. After all, the C block prices were widely predicted to be substantially below those in the MTAs. If anything, those DEs forced out of the C block auction by astronomical prices may re-emerge in the F block “with a vengeance” and bid prices even higher, since the F block will be the last chunk of spectrum of any size to be auctioned for a while.

As such, minorities, women and small businesses are going to need the ability to pool their resources in the F block auction, so the Commission should maintain the modified minority investors exception that presently exists in the C block auction (and which was recently upheld in Omnipoint).

III. INSTALLMENT PAYMENTS AND BIDDING CREDITS

The installment payment plans and bidding credits for the F block should be the same as in the C block, for the sake of simplicity if nothing else.

As stated earlier, there can be no assurance that F block prices will be lower than C block prices, and they could very well be even higher!³

IV. SMALL BUSINESS

It defies both logic and the imagination that any entity which can afford to bid \$1.3 billion for a single PCS license in a single city can ever be considered to be a “small business.” Thus, although the C block small business definitions should be used in the F block, **the Commission should consider the value of C block licenses in the total assets calculation for F block eligibility.**

In other words, any C block bidder (including affiliates) which has acquired C block licenses with net bids totalling more than \$500 million should be disqualified from participation in the F block auction. This also means that any entity which has raised over \$500 million in capital should also be disqualified from the F block auction. Otherwise, the Commission will be ensuring that PCS licenses are concentrated in the hands of a few “small businesses” instead of in the hands of a few large ones!

V. EXTENDING SMALL BUSINESS PROVISIONS TO THE D & E BLOCKS

All existing C block small business provisions (up-front and down payments, installment payments, bidding credits, etc.) should be extended to the D, E and F block auctions, without modification (again, in the interest of

³ Although the installment payment and bidding credits should be race-neutral, the Commission should continue to collect race and gender information in the D, E and F block auctions for future use.

simplicity). The primary reason for allowing small business provisions in the D and E blocks is to maximize the chances of small businesses, and particularly small businesses owned by minorities and women, to acquire PCS licenses.

VI. HOLDING PERIODS

Perhaps the biggest obstacle NatTel encountered while attempting to raise capital for the C block auction was investors' concerns regarding the holding periods. Although NatTel agrees that holding periods should be used to deter sham bidding and speculators, NatTel agrees with the Commission's tentative conclusion that F block licensees should be allowed to transfer their F block licenses to qualifying DEs within the first three years. The unjust enrichment provisions should remain.⁴

VII. OWNERSHIP DISCLOSURE

The existing C block rules should be used in the D, E and F blocks. Additionally, audited financials are totally unnecessary because many of the bidders will be newly- and/or recently-formed entities.

VIII. AUCTION SCHEDULE & RULES

The Commission should auction the D, E and F block licenses concurrently in the same auction. If the Commission also, as it tentatively suggests in the NPRM, extends the small business provisions to the D and E blocks, the result will be the maximum participation in the auction by a variety

⁴ The Commission should seriously consider amending the C block rules to allow for the same holding period. This will help the DE community greatly in terms of acquiring build-out financing.

of bidders, including small businesses, minorities and women. What this also will accomplish is to allow DEs a chance at acquiring non-DE blocks of spectrum (D and E), instead of forcing all the DEs into the "ghetto" of the F block with a resulting unwarranted increase in prices (by virtue of all the DEs bidding in one block).⁵

In terms of the timing of the D, E and F block auctions, as Commissioner Barrett stated in his separate statement to the NPRM "[the Commission] must remain cognizant of and allocate sufficient time for potential bidders to obtain capital for their PCS ventures." Thus, NatTel believes that the D, E and F block auction should occur no earlier than 120 days after the conclusion of the C block auction.

Finally, although not addressed in the NPRM, the Commission should take a serious look at the anti-collusion rules, particularly with respect to bidders which have dropped out of the auction teaming up with bidders still active in the auction. The Commission has already received a waiver request on this very issue in the C block auction and should adopt the substance of the waiver request in the D, E and F block auction. Since it is impossible for bidders who have dropped out of an auction to collude, the Commission should allow such bidders to invest in active bidders in the same auction.

⁵ In retrospect, this has caused the excessively high pricing in the C block. If the Commission had extended small business preferences in the A and B blocks, C block pricing would be much more reasonable and more DEs would very likely have acquired A and B block licenses.

CONCLUSION

For the foregoing reasons, the Commission should modify the D, E and F block auction rules as described above.

Dated: April 4, 1996

Respectfully submitted,

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By: 

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CERTIFICATE OF SERVICE

I, Jack E. Robinson, hereby certify that on this 4th day of April, 1996, a copy of the foregoing was served by first class mail, postage prepaid, on the following parties:

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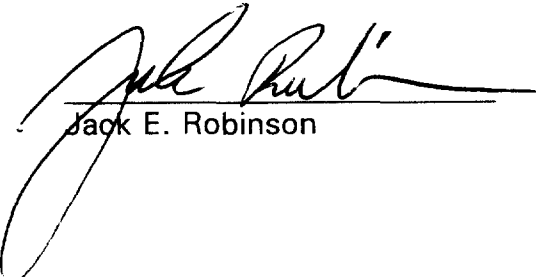
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